

No. 41904-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas Stephens,

Appellant.

Clallam County Superior Court Cause No. 10-1-00304-4

The Honorable Judge S. Brooke Taylor

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Stephens's state constitutional right to a unanimous jury was violated when the state failed to elect a particular knife to prove assault with a deadly weapon, and the judge failed to give a unanimity instruction for that charge.
2. Mr. Stephens's state constitutional right to a unanimous jury was violated when the state failed to elect a particular knife to prove the deadly weapon enhancement, and the judge failed to give a unanimity instruction for the enhancement.
3. The trial court violated Mr. Stephens's First, Sixth, and Fourteenth Amendment right to an open and public trial.
4. The trial court violated Mr. Stephens's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
5. The trial court violated the constitutional requirement of an open and public trial by closing the courtroom to the public and replaying the 911 call for the jury.
6. The trial court violated the constitutional requirement of an open and public trial by (apparently) consulting with counsel in chambers, answering a jury question, and granting the jury's request to see "the knife."
7. The trial court violated Mr. Stephens's Sixth and Fourteenth Amendment right to be present by (apparently) consulting with counsel in chambers, answering a jury question, and granting the jury's request to see "the knife."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence of multiple criminal acts is introduced to support a single conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the state introduced evidence that Mr. Stephens may have used one of four different knives to assault

his wife, but failed to elect a single knife as the deadly weapon used in Count I (assault with a deadly weapon) and as the weapon associated deadly weapon enhancement. Did the trial court's failure to give a unanimity instruction violate Mr. Stephens's state constitutional right to a unanimous verdict?

2. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge held a hearing in chambers to answer a jury question, and excluded the public (but not the parties and court staff) from the courtroom to replay an audio exhibit for the jury. Did the trial judge violate the constitutional requirement that criminal trials be open and public by closing the courtroom without first conducting any portion of a *Bone-Club* analysis?
3. An accused person has the constitutional right to be present at all critical stages of trial. In this case, the court consulted with counsel in chambers, answered a jury question, and granted the jury's request to see "the blade of the knife" outside Mr. Stephens's presence. Did the trial judge violate Mr. Stephens's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Thomas and Danielle Stephens were married, and in July of 2010 she was seven months pregnant. RP (1/11/11) 28-29, 41. They argued when Mrs. Stephens told her husband she had been unfaithful, and then attempted to use methamphetamine despite her condition. RP (1/11/11) 30; RP (1/12/11) 22, 117. Mr. Stephens left the house. RP (1/12/11) 118.

Mrs. Stephens went to the neighbor's, called the police, and alleged that Mr. Stephens had stabbed her with a knife. RP (1/11/11) 29, 66. When Mrs. Stephens sought medical attention, there was no indication that she had been stabbed, and she told the nurse that she had not been touched with a knife. RP (1/11/11) 39, 43, 47.

Police entered the house and seized a knife they found in a bathroom. RP (1/12/11) 9. When Mr. Stephens was arrested the next day, police seized a second knife from the glove box of his truck. RP (1/12/11) 18, 26. Two more knives were seized the following month, after an officer spoke with Mrs. Stephens at her house. RP (1/12/11) 80-82.

The state charged Mr. Stephens with Assault in the Second Degree. The state also alleged that he was armed with a deadly weapon, that the crime was against a family or household member, and that he knew the alleged victim was pregnant at the time. CP 17-18. The state later added

charges of Tampering with a Witness and Violation of a No Contact Order based on calls Mr. Stephens made while in custody. CP 18-19.

Mrs. Stephens did not testify or otherwise participate in the case against Mr. Stephens. Instead, her statements were introduced into evidence through the testimony of police and medical staff. RP (1/11/11) 13-83; RP (1/12/11) 3-17.

During the jury trial, the state offered evidence relating to all four knives. The knife seized from the bathroom on the day of incident was admitted as an exhibit. RP (1/12/11) 9. The prosecution also introduced the knife found in the glove box of Mr. Stephens's truck. RP (1/12/11) 26-27; Exhibit List, Supp. CP. The jury also heard about the two knives seized following the August conversation with Mrs. Stephens. A witness handled the two knives, and they learned that one was nine inches long and serrated, and that the other was an eight-inch "triangular shape butcher knife." RP (1/12/11) 82; (1/13/11) 42-43.

The prosecutor did not select one particular knife as the basis for the assault charge or the deadly weapon enhancement, and the court did not give the jury a unanimity instruction with respect to Count I. Court's Instructions, Supp. CP. The court did provide unanimity instructions specifically tailored to Counts II (Tampering) and III (Violation of a No Contact Order). Court's Instructions, Supp. CP.

During deliberations, the jury asked “Can we look at the blade of the knife?” Inquiry from Jury No. 2, Supp. CP. The court responded “yes” in writing, but the issue was not addressed in the courtroom. RP (1/13/11) 104-112. Nor do the clerk’s minutes reflect any discussion or decisions relating to the question. Clerk’s Minutes (1/13/11); Clerk’s Minutes (1/14/11). It is not clear which knife was provided to the jury.

The jury also asked to hear the 911 recording again. The trial judge cleared members of the public from the courtroom, closed the courtroom, and replayed the recording with the parties (and court staff) present. RP (1/14/11) 3.

The jury found Mr. Stephens guilty as charged, and answered yes to all of the special verdicts. Verdict Forms, Supp. CP. The court imposed an exceptional sentence of 105 months, including the 12-month deadly weapon enhancement. CP 8. Mr. Stephens timely appealed. CP 4.

ARGUMENT

I. THE CONVICTION FOR ASSAULT AND THE DEADLY WEAPON ENHANCEMENT VIOLATED ARTICLE I, SECTION 21 BECAUSE THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A manifest

error affecting a constitutional right may be raised for the first time on review.¹ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.² Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wash.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then

¹ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

² The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *Id.*, at 511.

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.³ *Coleman*, at 512; *see also State v. Vander Houwen*, 163 Wash.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.*, at 512.

- C. The absence of a unanimity instruction requires reversal of the assault conviction and the deadly weapon enhancement, because the prosecution relied on evidence of four different knives, any one of which might have been the knife Mr. Stephens allegedly used as a deadly weapon.

The state presented evidence that Mr. Stephens assaulted his wife with a knife. Four knives were ultimately recovered: one from the house (on the day of the 911 call), one from the glove compartment of Mr.

³ Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wash.App. 889, 916, 56 P.3d 569 (2002).

Stephens's truck, and two more from the house the following month. RP (1/12/11) 9, 26-27, 80, 93-94; RP (1/13/11) 42-43; Exhibit List, Supp. CP. Two of the four knives—the one seized from the home on the day of the incident, and the one from the glove box—were admitted into evidence. Exhibit List, Supp. CP; RP (1/12/11) 9, 26-27. The two knives seized following the August interview were marked, discussed, and handled by witnesses in open court, but were not admitted into evidence. RP (1/13/11) 42-43.

The prosecution did not establish which of the four knives was the knife allegedly used in the assault. Any statements Mrs. Stephens may have made identifying the correct knife were not introduced into evidence. Nor did the police subject any of the four knives to testing to determine the presence of blood, DNA, fingerprints, or other evidence that could provide a link to the alleged assault. Furthermore, the prosecutor referenced all four knives in closing arguments. RP (1/13/11) 75, 98.

Any one of the four knives might possibly have qualified as a deadly weapon, if it were the knife allegedly used in the assault. *See* RCW 9A.04.110(6). Despite this, the state failed to elect one weapon as the basis for Count I, and the court failed to give a unanimity instruction to that charge, or to the deadly weapon enhancement that accompanied the

charge.⁴ Court's Instructions, Supp. CP. This violated Mr. Stephens's constitutional right to a unanimous jury, and gives rise to a presumption of prejudice.⁵ *Coleman*, at 511-512.

In the absence of an election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may have thought that Mr. Stephens used the knife from the bathroom or the one seized from the glove compartment. Others might have focused on the two knives seized from the home in August, inferring from the testimony—as the prosecutor hinted in closing—that Mrs. Stephens identified those two knives to the officer who collected them. RP (1/13/11) 41-42.

The possibility that Mr. Stephens was convicted by a jury divided in this manner violated his state constitutional right to a unanimous jury. Accordingly, the assault conviction must be reversed and the enhancement must be vacated. *Coleman*, at 511. If the same evidence is presented on retrial, the state must elect a single weapon as the basis for the charge and the enhancement, or the court must give a unanimity instruction. *Id.*

⁴ The court did specifically give unanimity instructions relating to the tampering charge and the violation of a no contact order charge. Court's Instructions, Supp. CP.

⁵ As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wash.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

II. THE TRIAL COURT VIOLATED BOTH MR. STEPHENS’S AND THE PUBLIC’S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *E.S.*, at 702. Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.*, at ____.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-

262, 257.⁶ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strobe*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strobe*, at 230.⁷

⁶ *See also State v. Strobe*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

⁷ (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

- C. The trial court violated the public trial requirement by closing the courtroom to replay the 911 recording without conducting a *Bone-Club* analysis.

In this case, the trial judge closed the courtroom when the jury asked to hear the 911 recording. Inquiry from Jury No. 3, Supp. CP; RP (1/14/11) 2-3. The judge explained the reason to the jury: “I have closed the courtroom to try to facilitate doing this as closely as you would in your jury deliberations room.” RP (1/14/11) 3. The court did not analyze the *Bone-Club* factors.

This proceeding, conducted outside the public’s eye without the required analysis and findings, violated Mr. Stephens’s constitutional right to an open and public trial.⁸ U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public’s right to an open trial. *Id.*

Accordingly, Mr. Stephens’s convictions must be reversed and the case remanded for a new trial. *Id.*

⁸ The court’s passing suggestion that review of the tape was actually part of deliberations was incorrect. Jury deliberations must be private; the presence of outsiders invalidates the verdict. *See, e.g., Jones v. Sisters of Providence in Washington*, 93 Wash.App. 727, 730-735, 970 P.2d 371 (1999).

- D. The trial court violated the public trial requirement by holding a hearing in chambers to discuss and answer a jury question.

Although the judge consulted with counsel in open court to respond to two of the three jury questions, one question was answered without a hearing, apparently after consultation with counsel in chambers. Inquiries from Jury Nos. 1-3, Supp. CP; RP (1/13/11) 108-110; RP (1/14/11) 2-3. The jury asked “Can we look at the blade of the knife?” Inquiry from Jury No. 2, Supp. CP. The answer “Yes” is noted as the court’s response “After affording all counsel/parties opportunity to be heard.” Inquiry from Jury No. 2 Supp. CP. The record does not disclose which of the four knives was provided as a result of this inquiry.

This *in camera* proceeding, conducted outside the public’s eye without the required analysis and findings, violated Mr. Stephens’s constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public’s right to an open trial. *Id.* Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

- E. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The public trial right “applies to all judicial proceedings.” *Momah, at 148*. The Supreme Court has never recognized any exceptions to the

rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.”
*See, e.g., Strobe, at 230.*⁹

The Court of Appeals has held that the public trial right only extends to evidentiary hearings. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. *Momah, at 148; Strobe, at 230.*

III. THE TRIAL JUDGE VIOLATED MR. STEPHENS’S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at 702.*

B. An accused person has a constitutional right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment’s confrontation clause and from the

⁹ (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

Fourteenth Amendment's due process clause. *Gagnon*, at 526. Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *United States v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

C. Mr. Stephens's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

In this case, Mr. Stephens was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. The jury's second question did not relate merely to a point of law, but rather to a critical piece of evidence—"the blade of the knife." Inquiry No. 2, Supp.

CP. If the court provided a single knife to the jury, jurors may have concluded that the judge believed that knife to be the knife used in the alleged assault. On the other hand, if the judge provided two or three of the four knives but withheld one or two, jurors might have concluded that

the knives withheld had been found by the court *not* to have been used in the alleged assault.

Mr. Stephens should have had the opportunity to be present, to consult with his lawyer, and to provide input on the court's decision to allow the jury to see "the blade of the knife." The court's decision to answer the question and grant the jury's request to see "the blade of the knife" in Mr. Stephens's absence violated his Fourteenth Amendment right to be present. *Gagnon, supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial. In the alternative, Count I (and the deadly weapon enhancement) must be vacated and the case remanded for a new trial.

Respectfully submitted,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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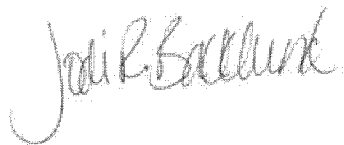
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 18, 2011.

A handwritten signature in cursive script that reads "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917
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